57679-8

57679-8

80420-6

THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON
SEATTLE

MUTUAL OF ENUMCLAW
INSURANCE COMPANY,

No. 57679-8-1

Appellant,

v.

T & G CONSTRUCTION, INC.,
and VILLAS AT HARBOUR
POINTE OWNERS ASSOCIATION,

Respondents.

BRIEF OF APPELLANT

Brent W. Beecher, WSBA #31095
James M. Beecher, WSBA #468
Attorneys for Appellant Mutual of Enumclaw

HACKETT, BEECHER & HART
1601 Fifth Avenue, Suite 2200
Seattle, WA 98101
206-624-2200 - Telephone
206-624-1767 - Fax

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

ADDITIONAL AUTHORTIES **PAGE**

I. ASSIGNMENTS OF ERROR

The Trial Court Erred When it:

A. Denied Mutual of Enumclaw's Motion for Summary Judgment that neither it nor its dissolved insured were liable to the Association.

B. Granted the Association Summary Judgment that the "measure of damages" against Mutual of Enumclaw was $3 million.

C. Granted the Association Summary Judgment that the insured was "Legally Obligated to Pay Damages."

D. Granted the Association Summary Judgment that No Policy Exclusions Applied to the Claim.

E. Granted the Association Summary Judgment that T&G's Violation of the Consent to Settle Policy Condition Applied.

F. Awarded the Association *Olympic Steamship* Attorney Fees.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

All issues arise from Summary Proceedings and are subject to *De Novo* review.

A. Issues Pertaining to Assignment of Error A.

1. Whether a dissolved corporation is exempt from claims that arose post dissolution.

2. Whether a liability insurer must pay a claim for which its insured is not legally liable.

B. Issues Pertaining to Assignment of Error B.

1. Whether the award of attorney fees against the insured in the underlying case was "damages" for purposes of the insurance policy.

2. Whether part of the insured's alleged liability to the claimant was based on contract damages that were not "because of property damage."

C. Issues Pertaining to Assignment of Error C.

1. Whether the insurer was estopped from challenging its insured's legal obligation to pay.

2. Whether the insured, a dissolved corporation, was legally exempt from the liability alleged to create coverage.

3. Whether the Confessed Judgment against the insured is void for lack of conformity with RCW 4.60.

D. Issues Pertaining to Assignment of Error D.

1. Whether the Impaired Property exclusion applied.

2. Whether the Cost of Repair exclusion applied.

3. Whether the Your Work exclusion applied.

E. Issue Pertaining to Assignment of Error E.

Whether the insurer was prejudiced by the insured's violation of the consent to settle condition in its policy.

F. Issue Pertaining to Assignment of Error F.

Whether the insured's breach of the consent to settle condition precluded an award of *Olympic Steamship* attorney fees.

III. STATEMENT OF THE CASE

A. Factual Background

This is an insurance coverage case growing out of a Construction Suit currently under review in *Mutual of Enumclaw Insurance Company, v. T&G Construction, Inc., and Villas At Harbour Pointe Owners Association*, Court of Appeals Case No. 57679-8-1. The factual and procedural history related in Appellant's Brief in that companion case is quite detailed and adopted by reference for application in the present appeal.

Briefly, Possession View, LLC ("Possession View") was the developer of the Villas at Harbour Pointe ("The Villas"), a condominium complex consisting of 23 buildings, with a total of 96 units. Possession View hired Construction Associates, Inc. ("CA") as the general contractor on the project. CA, in turn, hired many subcontractors to perform certain aspects of the construction work. One of these subcontractors, T&G, Inc.

("T&G"), was hired to install siding. Mutual of Enumclaw Insurance Company ("Mutual of Enumclaw") insured T&G under a general liability policy at all times relevant.

The Villas at Harbour Pointe Owners Association ("the Association") sued the developer under the Condominium Act (RCW 64.34) and 28 contractors or subcontractors were added as defendants. Mutual of Enumclaw defended T&G under a reservation of rights. The suit was ultimately settled by the developer and other contractors for an aggregate payment of $5,733 million. (CP 405) T&G had long been out of business and was a dissolved corporation before the Association claims were presented. (CP 795) It was excluded from the global settlement because its insurer, Mutual of Enumclaw, refused the large settlement demand against its dissolved and immune former insured.

Much of the factual controversy regarding T&G in the Construction Suit involved the extent and method of repair of siding deficiencies. The evidence showed that spot repairs to replace and seal areas around envelope openings in all 23 buildings could be accomplished for as little as $300,000, while the cost to totally remove and re-clad with new siding could cost in the $2 to $4.5 million range. (CP 626) In its reasonableness findings, the Court in the Construction Suit found that "Full siding removal is the only way of discovering all the defects and the

only remedy that would allow the homeowners to sell their property in the future for full value by advising future owners that the problem had been fully remedied." (CP 627)

The spot repair method dealt with the actual "property damage" caused by T&G's work which was localized around window openings. (CP 1106) The strip and re-clad was designed to allow "inspection" for discovering defects which could lead to damage at some time in the future. This difference is important in comparing breach of contract damages against covered "property damage."

Mutual of Enumclaw commenced this Coverage Suit to determine the extent, if any, of its indemnity obligation for the claims against T&G. (CP 1) Shortly after this suit was filed, T&G's former president stipulated to a $3.3 million settlement (CP 427) without the consent of Mutual of Enumclaw. (CP 791) This agreement resulted in a $3.3 million Consent Judgment (CP 757) collectable only against Mutual of Enumclaw. We know that the Association overstepped its bounds - the trial court in the Construction Suit found that the dollar amount the Association attempted to palm off on Mutual of Enumclaw by way of T&G was $300,000 *above and beyond* the admittedly nebulous bounds of reasonableness. (CP 1085)

B. Procedural History of the Coverage Suit

The Coverage Suit was resolved through a series of Summary Judgment Motions.

The Order on the first Motion for Partial Summary Judgment adopted a $3 million "reasonableness finding" in the Construction Suit as the measure of damages in the Coverage Suit. It also held that policy exclusions for "impaired property" and for "withdrawal from use" did not apply to the Association's claims. (CP 763)

Mutual of Enumclaw's Motion for Summary Judgment on the issue of its responsibility for a claim for which its dissolved insured was not actually liable was denied. (CP 1289)

In a second Motion for Partial Summary Judgment, the trial court ruled that the policy exclusion for damage to the "work" of T&G did not apply to the Association's claims. (CP 1173)

Finally, the court essentially incorporated its prior Partial Summary Judgment Orders into an Order on Summary Judgment awarding $3 million, plus interest and attorneys' fees. (CP 1347)

Review of the Construction Suit and the Coverage Suit together demonstrates how the misuse of a statutory reasonableness hearing procedure improperly impacted and obscured the coverage analysis. This contrivance resulted in a multimillion-dollar judgment against Mutual of

Enumclaw even though its insured was immune from liability — and even though the Consent Judgment included damages specifically excluded from coverage.

C. The Insurance Policy

The insurance policy in question is the 1993 edition of the standard Commercial General Liability Coverage Form published by the ISO. (CP 643) The policy provisions at issue are attached as an Appendix.

IV. LEGAL AUTHORITY

The Association claims that it is entitled to coverage under the Mutual of Enumclaw policy for $3 million of the confessed "judgment" entered in the Construction Suit. In fact, coverage under the Mutual of Enumclaw policy is limited or eliminated because 1) the claim is not covered by the policy's granting language, 2) coverage for the claim is limited by policy exclusions, and 3) the insured violated a Condition to Coverage. Finally, the Association was not entitled to an award of its attorney fees in this case. The trial court's resolution of each of these issues was wrong as a matter of law. For the reasons stated below, the Court should reverse the judgment against Mutual of Enumclaw.

A. Coverage Under the Policy

The Mutual of Enumclaw policy at issue in this case is a standardized Commercial General Liability policy. As with all such

policies, it contains a broad grant of coverage to the insured, which is then narrowed by exclusions for certain types of liability. In *Diamaco, Inc. v. Aetna Casualty and Surety Co.*, 97 Wn. App. 335, 337, 983 P.2d 707 (1999), this Court set forth a two-step burden shifting approach to determine what coverage is available under an insurance policy with respect to a particular claim. First, the insured has the burden of proving that the loss falls within the policy's grant of coverage. If the insured is successful, the burden then shifts to the insurer to prove that the claim is partially or entirely outside of coverage because of policy exclusions. This brief addresses each of these two steps in some detail.

1. Coverage is Limited by the Policy's Granting Language.

a. There is No Coverage Because T&G was not "legally obligated to pay."

The grant of coverage states that the insurer will "pay all sums the insured becomes legally obligated to pay as damages because of . . . property damage to which this insurance applies." The existence of this "legal obligation," as it turns out, was as ardently denied by T&G in the Construction Suit as it is by Mutual of Enumclaw in this Coverage Suit. The primary basis of that denial is that T&G was a dissolved corporation, and thus not a proper defendant in the first place.

i. Mutual of Enumclaw is Not Collaterally Estopped from Challenging T&G's Purported Legal Obligation to Pay.

In this Coverage Suit, it was T&G's assignee's burden to prove that T&G was legally obligated to pay damages because of property damage. *Diamaco, Inc. v. Aetna Casualty and Surety Co.*, 97 Wn. App. 335. The Association attempted to meet its burden with a single argument: T&G's "legal obligation" was a *fait accompli* - Mutual of Enumclaw was collaterally estopped from challenging T&G's legal obligation to pay by the trial court's reasonableness findings and / or judgment in the Construction Suit. (CP 22)

The subject of T&G's dissolution did, indeed, come up during the course of the Construction Suit. T&G brought a motion for Summary Judgment based on corporate dissolution, which the trial court denied, citing *factual* issues to be litigated and determined. (CP 1273) Subsequent to that motion, the Association settled with CA, taking an assignment of CA's claims against T&G. (CP 405) T&G then settled with the Association (CP 427) and the Association brought a motion for a reasonableness hearing in the Construction Suit. (CP 10) The judge in the Construction Suit issued Findings of Fact and Conclusions of Law re: Reasonableness Hearing, in which she found that T&G might have

ultimately prevailed on the dissolution issue, but that she felt (wrongly) that such an outcome would have been unlikely. (CP 628)

That is *all* -- an issue of disputed fact, coupled with a judge's opinion on how the case *might have* been decided, *if* it had gone to trial and been appealed. That is the entirety of the supposed bulletproof "judgment" that the Association argues represents the conclusive resolution of the dissolution issue that is binding on Mutual of Enumclaw. The undeniable fact remains that the effect of T&G's dissolution has never been decided by *any* court. A key theme in this appeal is the question of what legal determination, exactly, is Mutual of Enumclaw alleged to be bound *by*?

In essence, the Association argues that because it was able to convince T&G's former president to hand over his insurance rights in exchange for no more unpleasant legal proceedings, it has "established" that T&G was "legally obligated" to them for purposes of the Mutual of Enumclaw grant of coverage. The Association is wrong, but it is not the first litigant to make such an argument. In the case of *Yakima Cement Products Co. v. Great American Ins. Co.*, 14 Wn. App. 557, 544 P.2d 763 (1975), F.S. Jones Construction Company was a general contractor constructing buildings. F.S. Jones hired Yakima Cement as a subcontractor to provide pre-cast concrete panels to be incorporated into

the structures. *Id at 558.* There were certain defects in the panels, which Yakima Cement corrected during the course of construction. Upon completion, Yakima Cement sued F.S. Jones for failure to pay under the subcontract. F.S. Jones counterclaimed alleging the following damages: increased labor and materials costs, extra charges filed by other subcontractors, loss of profit and damage to F.S. Jones reputation. *Id at 558.* Yakima Cement tendered the defense and indemnity of F.S. Jones' counterclaims to its insurer, Great American, which declined on the ground that the policy covered "property damage," which F.S. Jones had not alleged.

Shortly thereafter, Yakima Cement and F.S. Jones settled their claims, and requested that the federal court enter agreed findings of fact and conclusions of law and a judgment in favor of Yakima Cement in the amount of $107,974 on the contract, and in favor of F.S. Jones in the amount of $69,474 on its counterclaims. Great American's lawyer appeared, and objected to the entry of the findings and conclusions, because "the action had settled, and thus the only purpose for entry of findings would be to attempt to collaterally estop [Great American] in a future action on the issue of coverage." *Id.* at 559. The federal court decided that the insurer's attorney had no standing to object, and entered the findings, conclusions, and judgment. Among those findings, despite

the fact that no property damage had been alleged, was the following passage:

> As a proximate result of the negligence of Yakima Cement . . . Jones was damaged in the following particulars:
>
> "(a) Jones had ordered certain materials to be placed into the operations building including the roof, steel joists and steel posts and beams to support the same. These materials were to be incorporated into the operations building after the walls (pre-cast panels) were erected. *Because the pre-cast concrete panels manufactured by Yakima Cement were defective and said defects had to be cured, said roof materials, beams, steel joists, and other structural steel was materially damaged because of its exposure* to natural elements. As a result thereof, said damage had to be cured and corrected by F. S. Jones at its expense in the amount of $ 26,000.00 before it could be incorporated into said building.
>
> *Id.* at 560, fn. 1 (emphasis in original).

The concern expressed by Great American's attorney in the federal case turned out to be well founded. Yakima Cement sued Great American for policy coverage and argued "that the findings and conclusions entered in the federal court action recite facts which invoke coverage under the insurance policy, are binding on defendant in this action, and require entry of judgment in favor of plaintiff." *Id.* at 560. The Court's response was unequivocal: "We disagree." *Id.*

The Court went on to recite the law of this State on the issue of binding a liability insurer to results of proceedings in a case against the insured.

> The rule is that when an insurer has notice of an action against an insured, and is tendered an opportunity to defend, it is bound by the judgment therein upon the question of the insured's liability. The judgment, however, is not conclusive as to the question of coverage of the policy in question, for the reason that the causes of action for tort liability and for indemnity liability are separate and distinct. Thus, the judgment fixing the tort liability of the defendants in the main action is not *res judicata* of the indemnity liability of the insurance company in the garnishment proceedings.
>
> Notwithstanding this, the doctrine of collateral estoppel applies in a proper case. This doctrine is that the insurer is bound by any material finding of fact essential to the judgment of tort liability, which is also decisive of the question of the coverage of the policy of insurance. It would, of course, be anomalous for a court to find such a critical fact one way in the tort action, and to the opposite effect in the garnishment proceeding.
>
> *Id. at 561 (citations omitted).*

The court further held that "[i]t is axiomatic that for collateral estoppel by judgment to be applicable, that the facts or issues claimed to be conclusive on the parties in the second action were actually and *necessarily litigated* and determined in the prior action." *Id at 561. (emphasis in original).* Applying these concepts, the Court found that issues in the federal action were never litigated, and that the federal court was not required to enter findings of fact to terminate a settled lawsuit.

The Court concluded that "these findings are ineffective, not binding, and cannot be used to collaterally estop defendant in this action." *Id at 562.*

Just as in *Yakima Cement*, T&G faced a claim that likely fell outside the grant of coverage in its insurance policy. In *Yakima Cement*, the issue was whether there were "sums the insured becomes legally obligated to pay as damages *because of property damage*" and in this case, the issue is whether there were "sums *the insured becomes legally obligated to pay* as damages because of property damage." In both situations, the operative question was whether the claim fell within the policy's grant of coverage.

In this case, as in *Yakima Cement*, the insured settled the case, and attempted to bolster its insurance coverage arguments by asking the trial court to bless the settlement with judicial findings and conclusions, and enter a stipulated judgment. In *Yakima Cement*, the federal court was not required to enter findings of fact to dismiss the case pursuant to the settlement. In the case at bar, the trial court in the Construction Suit similarly had no obligation to hold a reasonableness hearing, or enter findings of fact and conclusions of law regarding reasonableness. In fact, Mutual of Enumclaw has presented argument in the case linked to this matter that the trial court did not even have the *right* to hold the hearing.

But one way in which the case at bar is different from *Yakima Cement* is that the federal court in *Yakima Cement* did actually enter findings that the insured was liable for property damage. In contrast, the trial court in the Construction Suit found that, because of T&G's dissolution, there was a question of fact as to whether T&G could be liable to (legally obligated to pay) CA's assignee. (CP 1273) While the judge found that it was "likely" that T&G would be unable to avoid liability because of its dissolution (CP 625) that is far short of actually ruling that T&G *was* legally obligated to pay anyone. It is axiomatic that for collateral estoppel to apply, that the facts or issues were *actually* and *necessarily litigated* and *determined* in the prior action. *Id* at 561. That issue was not actually determined in the Construction Suit, it was not necessary to determine in the Construction Suit (given the settlement), and it was consciously not determined by the court in the Construction Suit. The Court should rule that Mutual of Enumclaw was entitled to argue, in the Coverage Suit, that T&G was not legally obligated to pay CA or its assignee, the Association.

Once the Court in *Yakima Cement* determined that Great American was not bound by the federal court's determination that its insured was liable for property damage, the Court addressed the issue itself. The Court determined that the issue of the basis for Yakima Cement's liability had

never been litigated, and remanded the case to the trial court for a factual determination. As will be explained below, T&G's dissolution barred CA's claim as a matter of law. Therefore, the trial court erred in denying Mutual of Enumclaw's Motion for Summary Judgment on that issue. But even giving conclusive credit to the judge's reasonableness findings, there would have been a question of fact about when the claim arose, so the trial court erred in granting the Association's Motion for Summary Judgment that T&G *was* legally obligated to pay CA. In either event, the Judgment in favor of the Association should be reversed.

ii. Mutual of Enumclaw is Entitled to an Actual Adjudication of T&G's Alleged Legal Obligation to Pay.

Nelson v. Sponberg, 51 Wn.2d 371, 318 P.2d 951 (1957), holds that an indemnitee must prove that he was actually liable for an agreed settlement amount as a condition of recovery from his indemnitor.

The *Nelson* case presented an indemnity claim for the amount a building owner agreed to pay to a woman who fell on some stairs at his property. The building owner brought an indemnity claim against the builder for providing an allegedly defective handrail. The indemnity "action was tried to the court, which found that . . . the settlement made by the plaintiff was reasonable and prudent." *Id. at 373.* The court went on to state that:

> The trial court recognized the insufficiency of the evidence to establish proximate cause, but concluded that it was not necessary for the plaintiff to establish the fact that the injuries were caused by the negligence of the defendant, since a good faith settlement had been made.
> . . .
> As recognized in that case, Washington is with the majority of courts which hold that an indemnitee who seeks reimbursement from his indemnitor for a payment made by him in discharge of a claim indemnified against is not bound to submit to suit before paying the claim; but if he pays without such suit, as a condition of recovery from his indemnitor, he is under the necessity of proving that he was liable for the amount thus paid.
>
> *Id. at 376*

The "actual liability" requirement was more recently stated in *Moen Co. v. Island Steel,* 128 Wn.2d 745 912 P.2d 472 (1996), as follows:

> Under Washington law, an indemnitee who settles does not automatically recover the amount of the settlement from the indemnitor but must prove it was in fact liable for the amount of the settlement under the "actual liability" standard.
>
> *Id. at 763*

In the present case, there has never been a finding that T&G was actually liable to the Association or its assignor. As the above cases demonstrate, a finding that a settlement was reasonable does not meet the requirement of actual liability.

iii. T&G was Not Legally Obligated to Pay CA Because T&G was a Dissolved Corporation[1].

According to the unambiguous common law and the holding of *Ballard Square Condominium Owner's Assoc. v. Dynasty Construction Co.*, 126 Wn. App. 285, 108 P.3d 818 (2005), post-dissolution claims are absolutely barred. On the other hand, if a claim existed prior to dissolution, then the corporation must give notice of dissolution to known creditors, or claims against that corporation will expire within two years. Thus, T&G was immune from liability if *either* of the following conditions is true: First, CA's claim arose post-dissolution, or Second, CA's claim arose pre-dissolution, but CA was not a known creditor of T&G at the time of dissolution.

CA's Claims Arose Post-Dissolution.

There are three ways this Court can be certain that CA's claims arose after T&G dissolved. The first, and perhaps most compelling, is that CA said so. The second is that the *Ballard Square* case says so. The third is that the statute says so.

---

[1] This section of the brief, A(1)(a)(iii), regarding the effect of T&G's corporate dissolution, is substantially replicated from the Appellant's Reply Brief in the linked case No. 56144-8-1. This is because the facts are identical and there has been no change in applicable law. It is reproduced here for the convenience of the Court. The citations in this section, therefore, correspond to the record in case No. 56144-8-1.

In defending T&G's motion for Summary Judgment based on the dissolution defense, CA told the court, "Construction Associates' present suit **is not** based on a right existing or liability incurred prior to T&G's dissolution. . . . Here, Construction Associates' first written claim was made December 28, 2000, two months after T&G was administratively dissolved." (CP 241) (emphasis added). The Association has argued that this quote is taken out of context. It is difficult to imagine a "context" in which "this suit is **not** based on pre-dissolution claims" could be interpreted to mean "this suit **is** based on pre-dissolution claims." The Association has pointed out that CA, later in the same brief, states that it sought *indemnity* for pre-dissolution *activities*. But even the Association admits that *indemnity* claims could not have logically arisen until well after dissolution, and "activities" are not synonymous with "claims". CP 1118.

Further, the Association is judicially estopped from rejecting CA's position. This situation is archetypical of the proper application of this doctrine. CA was attempting to avoid Summary Judgment in favor of T&G because of the application of the two-year claim cutoff. CA recognized that the two year cutoff applied only to claims existing prior to dissolution, so it told the court it had *no* claims that existed prior to dissolution. The trial court ruled, among other things, that this

representation created a material issue of fact with respect to when the contract / warranty claims arose, and denied Summary Judgment in favor of T&G. CP 131-133. That is to say, "There is no question but that the [trial] court bought what [CA] was selling the first time around." *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 28 (1st Cir. 2004). The *Synopsys, Inc.* case applied the same majority rule regarding judicial estoppel as this court did in *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001). That rule is simple; judicial estoppel applies if a litigant's prior, inconsistent statement was accepted by the court. *Id.* at 909. Just as was the situation in *Synopsys, Inc.*, this case "paints a convincing picture of a litigant who took one position, used that position to its advantage at the motion [for Summary Judgment] stage, and later attempted to switch horses midstream to revive a previously abandoned (and flatly inconsistent) claim." *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d at 30. This Court should hold CA to its stated position that its "suit is not based on a right existing or liability incurred prior to T&G's dissolution." (CP 1118)

Even if the Court were to allow the Association to disavow its assignor's legal position, the Association cannot distinguish its position from that of the homeowners in the *Ballard Square* case. The Association characterizes CA's breach of contract claim as pre-dissolution, while

simultaneously recognizing the homeowner's claim in *Ballard Square* was a post-dissolution claim. In *Ballard Square*, the entire basis of the homeowner's suit was that the contractor had breached the purchase and sale contract that specified that the project be completed in accordance with the plans. 126 Wn. App. 285, 288. The nature of the *Ballard Square* claim was identical to the contract claim in this case, and neither existed prior to dissolution.

The final reason this Court can be sure that CA's claim did not exist prior to dissolution is that the statute applies only to claims existing at the time of dissolution, and "contingent liabilities" are not "claims" by definition. RCW 23B.14.340, and RCW 23B.14.060, respectively. The Association has argued that CA had breach of contract and warranty claims against T&G prior to T&G's dissolution. But any such "claims" are, by definition, contingent liabilities and thus not claims at all. "A breach of contract is actionable only if the contract imposes a duty, the duty is breached, **and the breach proximately causes damage to the claimant.**" *Northwest Mfrs. v. Dep't of Labor*, 78 Wn. App. 707, 712, 894 P.2d 6 (1995) (emphasis added). In this case, CA could not have been legally damaged by anything T&G did or did not do, unless T&G's actions caused CA to be liable to either the developer or the Association. In sum, T&G's liability, if any, to CA was absolutely contingent on a

future legal determination that CA was liable to the developer or the Association. Because any claim CA may have had against T&G was a contingent liability at the time T&G dissolved, it was "not a claim" under the RCW 23B.14.060, and could not possibly have "existed" pursuant to RCW 23B.14.340. CA's claim against T&G did not exist prior to dissolution, and T&G was thus not "legally obligated" to the CA.

Even If CA Had A Pre-Dissolution Claim, It Was Barred By The Two Year Statutory Limit Because CA Was Not A Known Creditor Of T&G.

RCW 23B.14.340 provides that an administratively dissolved corporation like T&G can be sued for only two years after dissolution for claims that existed prior to dissolution. It is undisputed in this case that CA did not sue T&G within two years of the date it was dissolved. The Association has argued that the two year bar does not apply to creditors known to the dissolved corporation at the time of dissolution, unless the corporation gave notice of its dissolution under RCW 23B.14.340. They contend that CA's claim was "known" to T&G prior to dissolution (RCW 23B.14.060), but no notice of the dissolution was given, and thus T&G cannot invoke the two year limit of RCW 23B.14.340. This argument fails as a matter of law and a matter of fact. As a matter of law, as described above, any pre-dissolution "claim" CA may have had against

T&G was a contingent liability, and thus "not a claim" under the statute. No notice need be given for contingent liabilities.

As a factual matter, the "ample evidence" (*Respondent's Brief at 36*) that the Association suggests proves that T&G was aware of CA's complaints prior to its dissolution, consists entirely of two declarations of CA employees who say they asked T&G to make some repairs several months before T&G dissolved. *SUB* 692, 693. CA's project superintendent, however, testified that *all* repair items communicated to T&G were taken care of or resolved shortly thereafter. (*Declaration of Eric Johnson*, Exhibit 4, Expected to be designated CP *1528).* At the reasonableness hearing, T&G's president Tracy Gillet testified that CA was *never* able to convince him that T&G's work was defective. RP 40:6. The Association contends that T&G "knew", before dissolution, of CA's claim that T&G owed it complete strip and re-clad of the condominiums. The facts do not support the Association's contention. Because there were no pre-dissolution claims, T&G was not "legally obligated to pay" CA. The claim is outside the grant of coverage, and the Court should rule that there is no coverage under the policy for this reason.

b. There is No Coverage because the "Judgment" against T&G is Void.

While the issue of T&G's dissolution was presented in Mutual of Enumclaw's appellate brief in the Construction Suit, the validity of the judgment in that case was not. The concept of a "judgment" might imply that something had been "judged." Under certain circumstances, however, it sometimes mutually advantageous to legal adversaries to obtain a judgment against one of them without any "judging." Because having judgment entered against oneself is traditionally thought of as something to be avoided if at all possible, there is a certain natural skepticism of what motivates a defendant to roll over, not just by settling and paying, but by actually and actively requesting that the court "judge" the defendant to be in the wrong. On even casual reflection, it is obvious that such a move is designed to affect the rights of a non-present party in the vast majority of cases. It is perhaps for this reason that the legislature has tightly regulated the mechanism by which consent judgments, also known as judgments by confession, may be obtained.

RCW 4.60 contains a number of requirements that must be met, on pain of a void "judgment." The requirements are the following:

1. The defendant must make a confession. RCW 4.60.010.
2. The plaintiff must assent to the confession. RCW 4.60.010.

3. Both the confession and the assent *shall* be in writing, signed by the parties, and notarized. RCW 4.60.040

4. A statement in writing shall be made, signed by the defendant and verified by his oath, to the following effect:

(1) It shall authorize the entry of judgment for a specified sum.

(2) If it be for money due or to become due, it shall state concisely the facts out of which the indebtedness arose, and shall show that the sum confessed to be due, is justly due or to become due. RCW 4.60.060

5. The statement must be presented to the superior court or a judge thereof, and if the same be found sufficient, the court or judge shall indorse thereon an order that judgment be entered by the clerk; whereupon it may be filed in the office of the clerk, who shall enter a judgment for the amount confessed, with costs. RCW 4.60.070.

In this case, the Association obtained a confessed judgment from T&G. That "judgment," however, did not meet the statutory requirements of RCW 4.60. T&G did not make a notarized "confession" in writing. RCW 4.60.010. The only thing that even has the trappings of a "confession" was the settlement agreement between T&G and the Association, in which T&G *expressly denied* liability. (CP 430) The Association's briefing on reasonableness could be considered an "assent," but in any event, neither the settlement nor the briefs were notarized. RCW 4.60.040. T&G never made a sworn, written statement authorizing the judgment for a specified sum, nor did it recite the facts out of which

the indebtedness arose. RCW 4.60.060. T&G never confessed that the judgment amount was "justly due" or to become justly due. *Id.* In fact, T&G's former president Tracy Gillet testified that T&G had done everything that it was asked to do at the site. (CP 1156) In short, the only times that T&G spoke to the issue of its culpability, in the settlement agreement (CP 430) and in testimony, it *denied* that it owed CA anything. Because there was no conforming statement from T&G, there was nothing to present to the superior court judge for entry of judgment in conformity with RCW 4.60.070.

Where a supposed judgment by confession is not verified in compliance with the statute, it is absolutely void. *Puget Sound Nat'l Bank v. Levy*, 10 Wash. 499, 39 P. 142 (1895) (under previous statute). In *Levy*, the court held that the failure to verify the defendant's signature on the confession made the judgment void. *Id.* The appellant argued that the court should relax the statutory requirements because the debt was bona fide. *Id.* The court, noting that there was no doubt about the bona fides, held that the confession was a statutory procedure, and must be strictly followed. *Id.* The judgment was void. *Id. Levy* is admittedly old, but it remains unchallenged.

The *Levy* result applies with equal force to the "judgment" obtained by the Association. It did not meet the statutory requirements,

and it is void. The only argument that the Association made in the Coverage Suit, to meet their burden that T&G was "legally obligated to pay" CA, was that there was a "judgment" against T&G. Because that "judgment" is void, the Association failed to meet their *Diamaco* burden, and the trial court in this lawsuit erred by granting the Association Summary Judgment on coverage.

c. There is No Coverage for Attorney Fees because they are Not Damages.

As noted above, Mutual of Enumclaw was obligated to "pay all sums the insured becomes legally obligated to pay as damages because of property damage..." The arguments above have addressed the issue of whether T&G was "legally obligated to pay." Another important facet of the grant is that it only covers "sums the insured is legally obligated to pay *as damages*."

The subcontract between T&G and CA contained an attorney fee shifting provision. It is undisputed that a significant, but undifferentiated portion of the settlement/judgment amount against T&G reflected an award of attorney fees pursuant to that subcontract. Because attorney fees are not "damages," there is no coverage for the portion of the $3 million sum that corresponds to attorney fees. The Court must give meaning to the phrase "as damages." To conclude otherwise would write "as

damages" out of the contract, a result expressly prohibited by law of this State. *State Farm Mutual Auto Ins. Co. v. Ruiz*, 134 Wn.2d 713, 721; 952 P.2d 157 (1988). "[C]ourts should interpret the policy in a way that gives effect to each provision." *Id.* (citation omitted).

The Court must therefore give meaning to the phrase "as damages," that qualifies which sums the insured may become legally obligated to pay. No court in this State has yet addressed the issue of whether attorney fees awarded against a defendant are "damages," but other courts have. For example, the insured school districts in *Cutler-Orosi Unified School Dist. v. Tulare County School etc. Authority,* 31 Cal. App. 4th 617 (1994) sued their insurer for coverage of a judgment against them that included an award of attorney fees under the Voting Rights Act. One central question was whether those attorney fees awarded against the insureds constituted "damages," as that term was used in the policy's grant of coverage. The court held that they did not, and there was no coverage for them.

> [T]he term "damages" under the insuring provisions of the instant policies clear[ly] and explicit[ly] does not include the attorney fees incurred by the voting rights plaintiffs. First, irrespective of how they are treated in the Voting Rights Act, an award of attorney fees, like other costs, does not compensate the plaintiff for the injury that first brought him into court; instead, the award reimburses him for a portion of the expenses he incurred in seeking . . . relief. Attorney fees therefore

> are inconsistent with the concept of "damages" as the term is used in its ordinary and popular sense, that is, compensation paid to a party for the loss or detriment suffered because of the wrongful act of another. Second, broadly interpreting the word "damages" to include *all* forms of civil monetary liability effectively renders meaningless the "as damages" limitation in the Industrial policies.
>
> *Id. at 632.*

Similarly, the issue came to the fore in *Scottsdale Ins. Co. v. Haynes, 793 So. 2d 1006 (Fla. Ct. App. 5th Dist. 2001).* The court ruled the same way:

> We conclude that the plain wording of this insurance policy does not encompass liability for attorney's fees, or costs for that matter. Attorney's fees are charged for a professional service. In a remote or indirect way they may constitute "damage" to an injured party entitled to recover them against a defendant. But they are not damages as that term is commonly understood. Rather, we conclude that attorneys' fees are a separate type of relief requiring special language before they may be assumed to have been included in a "damage" award in an insurance policy.
>
> *Id. at 1009-1010*

Because the component of the $3 million "judgment" that represents an award of attorney fees against T&G does not come within the grant of coverage, the trial court erred as a matter of law when it awarded the Association coverage for the full amount of the judgment. It was the Association's burden to prove what part of their claim came

within the grant of coverage. *Diamaco.* They failed to do so, and the Court should reverse the trial court's judgment in favor of the Association.

d. There is No Coverage for Elements of T&G's Alleged Liability to CA that are Not "Because of Property Damage."

The final aspect of the grant of coverage to which Mutual of Enumclaw directs the Court's attention is that there is only coverage for "sums which the insured becomes legally obligated to pay as damages *because of property damage*. . . ." That is to say, if T&G incurred liability to CA because of anything other than property damage, that liability would not be covered under the grant of coverage. Indeed, this is exactly the issue that was before the court in *Yakima Cement, supra.* The federal court had entered judgment that the insured Yakima Cement was liable in the amount of $69,474.17, but issued findings of fact that $26,000 of that liability was the result of property damage. *Yakima Cement Products Co. v. Great American Ins. Co.*, 14 Wn. App. at 559, 560. The Court found that there was an unresolved factual issue regarding what, if any, of the damages were "because of property damage."

Similarly, here, there has yet to be a determination of which part of the $3 million "judgment" against T&G represents "damages because of property damage." But there was evidence before the court in the Construction Suit that spot repairs to correct the property that had actually

been damaged could have cost less than $500,000. (CP 626) The Association below argued that Mutual of Enumclaw was trying to "undo" the Construction Suit court's reasonableness finding that a strip and reclad was necessary, and its cost was the appropriate measure of damages against T&G. (CP 979)

Mutual of Enumclaw wants to be absolutely clear on this point; the insurer is not challenging whether T&G could have been liable to CA for the cost of a strip and reclad versus the cost of spot repairs. T&G's liability to CA is an entirely different question than what is covered under T&G's insurance policy. *See Yakima Cement, supra* at 561. *("[T]he causes of action for tort liability and for indemnity liability are separate and distinct.")* To put the issue in relief, imagine that a sider was contracted to install cedar shingle siding on a condominium, but instead applied vinyl siding (using sound construction techniques). In the ensuing breach of contract action, the owner may well prove the need for a strip and reclad as the remedy for the breach, because the presence of the vinyl siding had lowered the market value of the condos more than the cost of the strip and reclad. In that situation, the sum the insured sider became legally obligated to pay was *not* because of property damage. Conversely, imagine a sider that accidentally shot a stained glass window with its nail

gun. That sum for which that sider was liable would be "damages because of property damage."

In the case at bar, a strip and reclad may have been the least costly way for CA to get the benefit of its bargain, in the contractual sense. That is an entirely different question from the degree to which the damages against T&G were "because of property damage." This case is admittedly in legal territory somewhere between the sider who used vinyl instead of cedar, and the sider who broke the window. T&G's siding did leak in certain places, and did cause actual property damage, in the form of rot, to some areas of the gypsum and framing beneath the siding. However, it is undisputed that much of the siding did its job perfectly (even if not in conformance with T&G's contractual obligations regarding the manner of construction). Under those areas, there was no property damage to the gypsum or the framing. Thus the cost of repairing actual property damage would be an obligation "because of property damage", but the cost of ripping out and replacing siding that had not failed, but that was outside of contract specs, would not be. The cost of repairing the actual property damage can accurately be measured by the estimates of what it *would* have cost to do spot repairs of the damaged areas.

Although the *Yakima Cement* case did affirm the conceptual distinctiveness of "contractual damages" and damages "because of

property damage," no case in this jurisdiction has addressed the situation where the cost of remedying *just* the property damage was measured by the cost of an unactualized method of repair. However, this situation is not unknown to the law. In the case of *Fidelity & Deposit Co. of Maryland v. Hartford Cas. Ins. Co.* 215 F. Supp. 2d 1171 (D. Kansas, 2002), the insured was hired by a school district to construct a performing arts center and a middle school, all together consisting of three buildings. During the course of construction, it became apparent to the school district that there were serious problems with the buildings. The district terminated the insured, and made demand on the insured's bonding company, Fidelity.

Fidelity took over the job, and decided to demolish two of the three buildings and start over, while making extensive repairs to the third. Fidelity sued the insured for the costs of completing the structures under the terms of the bond. The insured tendered Fidelity's claim to Hartford, its liability carrier, which declined the tender. Fidelity settled with Hartford, and pursuant to the terms of that settlement the insured assigned its rights against Hartford to Fidelity. *Id.*

The product of these machinations was that Fidelity stood in the shoes of the insured contractor, suing the liability insurer, Hartford, for coverage for construction defect liability. The important question before

the court was whether the insured's "legal obligation to pay damages" to Fidelity, on the two buildings that were completely torn down, was "because of property damage." There was evidence before the court of pervasive construction defects:

> Many of the masonry walls constructed on the project suffered significant deterioration. Several masonry walls were cracked, and blocks within the walls were cracked, crushed and broken. . . . In addition to cracked and broken block[s], the School District identified additional defects, including cracking control joints, cracked mortar joints, hacked-in mechanical openings, wet insulation, cracking concrete floor slabs, cracked lintels, cut and deflected rook deck, bent and burnt flashing, mislocated lintels and control joints, and improperly backfilled storm drain lines.
>
> *Id.* at 1178.

Fidelity argued that "it is unquestionable that the building had to be torn down," and "it should be awarded the full amount of rebuilding the project because. . . once defective work was incorporated into the project, property damage occurred and, therefore, even the repair and replacement of good work is covered property damage." *Id.* Hartford did not challenge the contention that it was a good business decision, and thus a reasonable indicator of the insured's liability to Fidelity, to tear the buildings down and start over. Rather, Hartford argued

> absent [Fidelity's] performance bond obligation to make the project conform to the contract specifications, the property damage, such as cracked walls, could have been fixed without having to tear down the project. Thus . . . a

> significant portion of the expenses incurred to rebuild the project were not caused by property damage and, therefore, Hartford is not responsible for those costs.
>
> *Id.*

After considering the evidence, the court found

> that many, if not most, of the walls had discontinuous rebar; the rebar was not tied together going up the wall.... [T]he gaps in the rebar caused the walls to be susceptible to cracking *in the future*. . . . Thus . . . the lack of physical injury here means that recovery is not appropriate for the type of damage where actual physical injury in the form of cracked walls is likely to occur in the future but has not yet become manifest.
>
> *Id. at 1183-1184 (emphasis added).*

Fidelity asserted that all of its damages were covered: $ 4,638,500 for insured's settlement with Fidelity, $2,097,839.58 for money withheld by the School District for work performed by the insured on the project, and $3,518,515.51 for Fidelity's out-of-pocket damages to rebuild the project. *Id.* Alternatively, based on expert testimony, the court found that reasonable cost *repairing* the manifest property damage in the buildings, by patching walls, etc, was reasonably estimated to be $1 million. *Id.* Because the decision to tear down and start over was based on many problems that had not yet developed into property damage, the cost to tear down and rebuild was not an obligation "because of property damage." *Id.* The court ultimately held that Hartford was required to indemnify Fidelity for what would have been the cost of repairing the actual property damage to the buildings - $1 million.

The same analysis applies to the case at bar. The most cost effective solution to remedy T&G's alleged breach of its contract with CA may well have been a strip and reclad. In its Findings of Fact and Conclusions of Law re: Reasonableness Hearing, the trial court in the Construction Suit found,

> It is very likely that the plaintiff standing in C.A.'s shoes would have proven the need for total removal of siding and building paper. . . The building paper and flashing problems were proved to be pervasive. Rot, decay and elevated moisture readings were already showing on buildings only a few years old. *Only a full strip and reclad can assure there won't be further water intrusions from the problems. Full siding removal is the only way of discovering all the defects and the only remedy that would allow the homeowners to sell their property in the future for full value by advising future owners that the problem has been fully remedied.*
>
> (CP 626) (emphasis added).

Thus the trial court expressly found that the cost of a full strip and reclad was the appropriate measure of contract damages against T&G, just as the court in *Fidelity* found that tearing down and rebuilding the buildings was the appropriate measure of contract damages against the insured in that case. But the reason that the full strip and reclad was preferable to spot repairs was that it was the only way to *prevent future* property damage, and preserve the property values of the Association members because of the fear of future property damage might depress those values. The cost of preventing future, possible, property damage

and bringing the buildings into contractual compliance is not "damages because of property damage," and is not covered by the policy. Like the court in *Fidelity*, this Court should rule that the Mutual of Enumclaw policy covered only T&G's obligation "because of property damage." The Court should reverse the trial court's Summary Judgment ruling that the entire $3 million "judgment" was covered by the grant of coverage in the Mutual of Enumclaw policy. The Court should remand this case for a factual determination of what obligation was "because of property damage."

2. Coverage is Limited by Policy Exclusions

Even if the Court were to determine T&G became "legally obligated to pay damages because of property damage," and that the entire $3 million sum was "because of property damage," that coverage is subject to policy exclusions. In this case, Mutual of Enumclaw relied on three exclusions that limit the coverage available to T&G. The trial court erroneously granted the Association Summary Judgment that none of these exclusions applied to this claim in any way. (CP 1347) The three exclusions upon which Mutual of Enumclaw relies are the Impaired Property exclusion, the Withdrawal from Use exclusion, and the Your Work exclusion. Each of these places a limitation on the potential

coverage available to T&G in this case, and will be individually addressed.

i. The Impaired Property Exclusion Limits Coverage.

As demonstrated, the Mutual of Enumclaw policy grants coverage only for damages "because of property damage." Mutual of Enumclaw has argued that the cost of a strip and reclad was not "because of property damage," as there were large sections of siding and sub-siding material that had not been damaged. However, even if the Association claimed that there was "property damage" to the *undamaged* gypsum, wood sheathing, and framing simply because it is beneath *potentially* leaky siding (i.e., that a likelihood of future damage, is, itself, present "property damage")[2], that claim would be excluded by the Impaired Property exclusion.

The Association cannot deny that it is claiming that it is entitled to certain damages from T&G, not because the siding was aesthetically unpleasing, but that the structure beneath it was "damaged" because it *might* not be adequately waterproofed. In its reasonableness determination, the court in the Construction Suit specifically found that the market value of the structures would be depressed unless the buildings were reclad, exactly because of that fear.

---

[2] Note that this proposition is in direct opposition to the *Fidelity* case, and not supported by any caselaw.

The policy definition of "impaired property" is as follows:

> "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:
>
> **a.** It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
>
> **b.** You have failed to fulfill the terms of a contract or agreement;
>
> if such property can be restored to use by:
>
> **a.** The repair, replacement, adjustment or removal of "your product" or "your work"; or
>
> **b.** Your fulfilling the terms of the contract or agreement.

The siding itself does not qualify as impaired property because that siding is the insured's work. But, the walls beneath the siding are not the insured's work. The Association alleges that the exterior walls, as a component, cannot be used or are less useful because of known or suspected defects in the siding. Even if there is "property damage" to the undamaged gypsum, wood sheathing, and framing, that material is property that was impaired because the walls incorporated allegedly defective siding. Furthermore, even assuming that there is such a thing as present "property damage" because of the threat of future property damage, that threat, and hence the property damage itself, would be entirely rectified by replacement of T&G's work, per the definition of

impaired property. Thus, while the rotten gypsum, wood sheathing, and framing would not qualify as Impaired Property, the areas where those materials were not rotten would meet the definition.

The Impaired Property Exclusion Prevents Coverage for the Cost of Replacing Siding that did Not Leak.

T&G's policy excludes:

> "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
>
> (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

Mutual of Enumclaw does not argue that this exclusion applies to either the cost of removing, replacing or repairing the siding that must be removed to get at the parts of the buildings that were actually damaged by water intrusion, nor the cost of repairing the actual sub-siding damage. But the Association is claiming much more than that. It is claiming that Mutual of Enumclaw is liable for the cost of reclading all of the buildings, including all areas where there has been no water intrusion.

If the Association asserts that there was property damage to the large areas of wall where no moisture had penetrated, then a large part of what they allege is damage to impaired property. And that impaired

property can be restored to use by "the repair, replacement, adjustment or removal of" T&G's work. The Association cannot have it both ways. Either the areas under the siding where there was no water penetration suffered from property damage, in which case they were impaired property, or they did not suffer from property damage, in which case there is no coverage under the policy's granting language. Whichever side the Association takes, the result is the same; there is no coverage for the cost of replacing the siding in the areas where there has been no water intrusion.

ii. The Withdrawal from Use Exclusion Limits Coverage

The Withdrawal from Use exclusion reads as follows. There is no coverage for:

> n. Recall of Products, Work or Impaired Property
>
> Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:
>
> (1) "Your product";
> (2) "Your work"; or
> (3) "Impaired property";
>
> if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

The first part of this exclusion is easily satisfied by the T&G claim: Damages claimed for any loss, cost or expense incurred by T&G or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of T&G's siding work. Once again, Mutual of Enumclaw does not argue that this exclusion prevents coverage for the repair of the material beneath the siding that was actually damaged by water. But the exclusion *does* prevent coverage for the cost of replacing the siding itself.

The exclusion was applied in *Federated Service Ins. Co. v. R.E.W.,* Inc., 53 Wn. App. 730, 770 P.2d 654 (1989). In *REW*, the insured was a general contractor that built a fruit cold-storage warehouse in Yakima. The insured installed a product known as "isoboard" as the inner panel liner for the facility. *Id.* The isoboard warped, and broke the air seal necessary for proper refrigeration. The general contractor funded the removal and replacement of the isoboard, which cost approximately $500,000, and tendered the claim to its insurer. *Id.* The court in *REW* ruled that there was no coverage for the withdrawal and replacement of the insured's defective product as a result of that exclusion. *Id.* at 736. Just as the removal and replacement of the defective isoboard was excluded by

the Withdrawal from Use exclusion, so is the removal and replacement of the allegedly defective siding in this case.

At the least, this exclusion would prevent coverage for the cost of all prophylactic replacement of siding in areas where there was no actual water intrusion. Inspection of the buildings revealed:

> . . . very limited water intrusion other than a specific unique condition with – related to windows that were very close together and have a trim component underneath it where the building paper was improperly applied. But that does not occur in all buildings. It occurs – these are unique conditions and I believe those are the related leaks that had come into unit owners at – at a couple locations. (CP 1106)

Even if there is coverage for the "work that failed" and allowed moisture to penetrate around the windows, the exclusion squarely prevents coverage for investigating, repairing, replacing, etc. other areas and other buildings on which there had been no failure. The Withdrawal from Use exclusion prevents coverage for, at least, a large percentage of the T&G claim, and the Court should reverse the trial court's Summary Judgment that this exclusion was inapplicable to the Association's claim.

iii. The Your Work Exclusion Limits Coverage

T&G's policy also contains an exclusion for T&G's Work. There is no coverage for:

> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."

The Association cannot escape the fact that the siding is T&G's "work" under the policy, and there is no coverage for property damage to T&G's work. In fact, it did not try to escape that conclusion; it simply tried to bury it by characterizing the damage to the siding, which is absolutely certain to occur when it is ripped off the building, as a "consequence" of the property damage to the interior parts of the buildings' walls. The Association is free to call it what it likes, but the reality remains immutable; the siding is T&G's "work", and the Association's principal claim to insurance money is because T&G's work is (or shortly will be) badly damaged. There is no coverage for the damage to T&G's work under the Mutual of Enumclaw policy, and the trial court erred when it determined that the Your Work exclusion did not apply to the Association's claim.

Cases are legion that describe the purpose and effect of CGL insurance policies. They *do not* insure the cost of repairing the insured's own faulty work. They *do* cover damaged caused to *other* property. A brief sampling of the Washington cases, which are but a fraction of the unified voice of national jurisprudence, follows: "Accidental injury to persons and damage to property *other than the product or completed work*

itself constitute the risks covered by this comprehensive general liability policy." *Harrison Plumbing & Heating, Inc. v. New Hampshire Ins. Group*, 37 Wn. App. 621, 628, 684 P.2d 875 (1984) (emphasis added). "[CGL coverage] applies to damage **caused** by the product, not to damage to the product itself." *Mut. of Enumclaw Ins. Co. v. Patrick Archer Constr., Inc.*, 123 Wn. App. 728, 743, 97 P.3d 751 (2004) (emphasis original). "[C]osts attendant upon the repair or replacement of the insured's own faulty work is part of every business venture and is a business expense to be borne by the insured-contractor in order to satisfy customers. It is a business risk long excluded by comprehensive liability policies." *Westman Industrial Co. v. Hartford Ins. Group,* 51 Wn. App. 72, 79, 751 P.2d 1242 (1988) (citations omitted).

Even if there is coverage for the damage that occurred as a result of water intrusion beneath the siding, inside the building envelop, there is no coverage for the replacement of the siding itself. It should not be forgotten nor gainsaid that the vast majority of the recovery now sought by the Association is based on the cost of removing and replacing T&G's work. The Washington cases cited above, among many others, rebut the contention that CGL policies provide that sort of coverage.

The Association attempted to avoid the application of this exclusion by claiming that there is no damage to T&G's work - the siding.

This is a specious argument, based on temporal smoke and mirrors. While the siding may not be damaged *now*, the Association makes no secret that it shortly *will be*. In fact, the Association proposes to rip down all of T&G's work, regardless of whether any particular section of it has performed perfectly. It is the cost of repairing this property damage, unquestionably to the siding, that the Association demands be paid by Mutual of Enumclaw. It is only by setting the clock back and forward at will that the Association can claim the cost of repairing property that has not yet been damaged. The Association's temporal weasel-word was "consequential." It used it in the sense of "future" and "as a result," and told the trial court that the siding will suffer "consequential" damage. The Court must not be distracted from the fact that damage to the siding is explicitly what that "consequential damage" is referring to. And there is simply no coverage for damage to the siding, arising out of the siding[3]. The Association presented no authority for its dramatic departure from the basic principle of insurance law that there is no coverage under a CGL for damage to the insured's work. Because the Work exclusion prevents coverage for damage to the siding itself, the trial court erred in ruling that no part of the Association's claim was circumscribed by this exclusion. If

[3]Because the Association freely acknowledges that the damage to the materials under the siding arose from moisture penetration *through* the siding, there can be no real debate that the damage arose from T&G's work.

the Court finds that the Association's claim comes within the grant of coverage, the Court should reverse and remand to the trial court for a determination of the value of the claim that is excluded by the Your Work exclusion.

B. There is No Coverage because T&G violated a Policy Condition.

Regardless, however, of the scope of the grant and the applicability of exclusions, there is no coverage under the Mutual of Enumclaw policy because T&G violated a critical policy condition to coverage: namely, that it obtain the insurer's consent before settling the case. That condition is

> No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

In Washington, consent to settle clauses are enforced to deny coverage, if a violation of the clause caused prejudice to the insurer. *PUD 1 v. International Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994). Despite the prohibition from doing so, T&G did voluntarily assume a $3.3 million obligation. Mutual of Enumclaw did *not* consent to the T&G's settlement (CP 791), and there is no evidence that T&G made any attempt to obtain consent. By settling the claim, T&G deprived Mutual of Enumclaw of its policy right to defend its insured.

The Association below claimed that Mutual of Enumclaw was not prejudiced by T&G's breach of the consent to settle condition, and therefore was not entitled to enforce it. (CP 1286) Contrary to the Association's assertion, however, few cases could present a clearer picture of prejudice. Mutual of Enumclaw had the right at all times during that litigation to withdraw its reservation, take full control of the defense, and litigate the dissolution issue and other defenses to the court of last resort. Regardless of whether the settlement in this case was deemed to be reasonable, Mutual of Enumclaw had the right to make its own determination of the strength of T&G's defenses, and litigate them accordingly.

Of course, it is impossible to rerun the course, and prove what the outcome *would* have been, had T&G complied with its obligation to at least ask for Mutual of Enumclaw's consent to settle. But it is the *right* to proceed with the defense which was stripped from Mutual of Enumclaw, and the loss of this right was prejudicial. The Court should rule that T&G's undisputed violation of the consent to settle clause precludes it from obtaining benefits under the insurance contract in this case.

C. Attorney Fees in this Case.

The Association sought and obtained an award of attorney's fees and litigation expenses under the rule announced in the *Olympic*

Steamship case. This rule ordinarily allows an insured to recover those expenses when it prevails in establishing contested insurance coverage. However, the present case is controlled by the following exception to the rule as stated in *PUD 1 v. International Insurance Co.*, 124 Wn.2d 789, 815, 881 P.2d 1020 (1994):

> We cannot authorize the imposition of attorney fees, however, when an insured has undisputedly failed to comply with express coverage terms, and the noncompliance may extinguish the insurer's liability under the policy. By settling the MDL 551 claims without the consent of their insurers, the insureds in this case took actions inconsistent with the express coverage terms of their policies. Although we have found they are nonetheless entitled to the insurance proceeds because the insurers were not actually prejudiced by their noncompliance, we cannot justify an attorney fees award under these circumstances.
>
> We, therefore, reverse the trial court's attorney fee award and, likewise, reject the Plaintiffs' request for attorney fees and costs on appeal.

As *PUD* I held, a breach of the consent to settle clause cuts off the insured's right to *Olympic Steamship* fees, even if that breach does not prejudice the insurer. T&G settled with the Association without MOE's consent – which was contrary to an express coverage condition in the policy. The breach of the consent condition cannot be denied by T&G or the Association.

The *PUD 1* decision's denial of an award of *Olympic Steamship* attorneys fees and expenses controls the present case because T&G breached the identical coverage condition which applied to the *PUD 1* case.

V. CONCLUSION

For the foregoing reasons, Mutual of Enumclaw respectfully requests that the Court determine as a matter of law that the Association is not entitled to coverage from Mutual of Enumclaw, and reverse the trial court's denial of Mutual of Enumclaw's Motion for Summary Judgment.

Alternatively, Mutual of Enumclaw respectfully requests that the Court determine that legal and/or factual issues prevented summary judgment in favor of the Association, and reverse the trial court's contrary resolution of the Association's Motions for Summary Judgment, and the Judgment in the Association's favor.

Finally, Mutual of Enumclaw respectfully requests the Court to rule that the Association is not entitled to its attorney fees in the case.

Respectfully submitted this 13th day of April, 2006.

HACKETT, BEECHER & HART

Brent W. Beecher, WSBA #31095
James M. Beecher, WSBS #468
Attorneys for Mutual of Enumclaw

APPENDIX

The Grant of Coverage

1. Insuring Agreement.

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

(CP 643)

Exclusions

l. Damage to Your Work

"Property Damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor. (CP 645)

m. Damage to Impaired Property or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

1. A defect deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

2. A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden or accidental physical injury

to "your product" or "your work" after it has been put to its intended use. (CP 645)

n. Recall of Products, Work or Impaired Property

Damages claimed for any loss, cost or expenses incurred by you or others for the loss of use, withdrawal, recall inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product;
(2) "Your work"; or
(3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

(CP 646)

Definitions

7. "Impaired property" means tangible property, other than "your product" or "your work" that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

a. The repair, replacement, adjustment or removal of "your product" or "your work"; or

b. You fulfilling the terms of the contract or agreement.

(CP 652)

15. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

19. "Your work" means"

a. Work or operations performed by you or on your behalf; and

b. Materials, parts or equipment furnished in connection with such work or operations.

"Your work" includes:

a. Warranties or representations made at any time with respect to the fitness quality, durability, performance or use of "your work" and

b. The providing of or failure to provide warnings or instructions.

Conditions

d. No insureds will, except at their own cost, voluntarily make a payment, assume any obligation or incur any expense other than for first aid, without our consent.

(CP 650)